MOHD RIDZWAN ABDUL RAZAK v. ASMAH HJ MOHD NOR

FEDERAL COURT, PUTRAJAYA
ZULKEFLI AHMAD MAKINUDIN CJ (MALAYA)
SURIYADI HALIM OMAR FCJ
AHMAD MAAROP FCJ
RAMLY ALI FCJ
BALIA YUSOF WAHI JCA
[CIVIL APPEAL NO: 01(f)-13-06-2013(W)]
2 JUNE 2016
[2016] (JT10)

TORT: *Defamation – Libel – Appellant accused of sexual harassment at workplace – Ingredients of sexual harassment – Whether present in existence of persistent and deliberate course of unreasonable oppressive conduct spiced with sexual hallmarks – Whether calculated to cause alarm, fear and distress in targeted person – Whether there must be corroboration of evidence – Whether complaint of sexual harassment justified*

TORT: *Damages – Counterclaim – Sexual harassment – Respondent accused appellant of sexual harassment at workplace – Whether appellant had used vulgar words and behaved lecherously towards respondent – Whether respondent adversely affected – Whether respondent's suffering attained level of physical harm to qualify for tort of intentionally causing nervous shock – Whether reasonable for court to grant general and aggravated damages*

The appellant and the respondent were employees of Lembaga Tabung Haji ('the company'). The respondent, being the subordinate of the appellant, reported directly to him. On 29 September 2009, the respondent lodged a complaint (the complaint) to the Chief Executive Officer of the company complaining of sexual harassment by the appellant. An inquiry was conducted and the committee found that there was insufficient evidence to warrant disciplinary action to be taken against the appellant. On 9 December 2011, the appellant issued a writ against the respondent seeking, *inter alia*, a declaration that he had not sexually harassed the respondent and that he had been defamed by her. In addition to a public apology, the appellant sought general and aggravated damages, interest and costs from the respondent. The respondent filed her defence and also a counterclaim against the appellant on 28 December 2011. In her defence, the respondent particularised the sexual harassment and further alleged that she had suffered under the appellant. The respondent counterclaimed for damages predicated on sexual harassment and claimed for general, aggravated and exemplary damages. The High Court dismissed the appellant's claim, and also entered judgment for the respondent on her counterclaim. As the finding of the High Court of the sexual harassment allegation had been established, general and aggravated damages of RM100,000 and RM20,000 were respectively awarded for sufferings, which the High Court held was the cause of the respondent's major

depression. The appellant appealed to the Court of Appeal in a singular notice of appeal against the rejection of the appellant's main suit and for allowing the counterclaim filed by the respondent. The Court of Appeal dismissed the appellant's appeal and affirmed the High Court's decision. The cause of action was founded on the tort of intentionally causing nervous shock. Dissatisfied with the decision of the Court of Appeal, the appellant applied for leave to the Federal Court and successfully obtained leave on the following question of law: is there a valid cause of action for a civil claim on the grounds of sexual harassment under the existing laws of Malaysia.

Held (dismissing appellant's appeal)

Per Suriyadi Halim Omar FCJ delivering the judgment of the court:

(1) Until the Employment (Amendment) Act 2012 came into force, there were no statutory provisions at all on sexual harassment in Malaysia. An important change came about in the form of the Employment Act 1955, when the new Part XVA, which deals with sexual harassment in the workplace was included. The newly created portion of the Employment Act therefore was a significant aspect of legal reform aimed at addressing the calls for specific legislative intervention in dealing with sexual harassment. Section 2(g) of the Employment (Amendment) Act 2012 inserted a new definition of sexual harassment in s. 2 of the Employment Act 1955 which satisfies the main elements of sexual harassment. The striking feature of *the Malaysian Code of Practice on the Prevention and Education of Sexual Harassment in the Workplace 1999 ('1999 Practice Code')* and the creation of Part XVA in the Employment Act 1955 has been that a victim is now entitled to lodge a complaint to the employer and to require the employer to investigate the complaint of sexual harassment. (paras 44-47)

(2) Harassment is defined as 'a persistent and deliberate course of unreasonable and oppressive conduct, targeted at another person, which is calculated and does cause that person alarm, fear or distress' (*Thomas v. News Group Newspaper Ltd*). Tainted further by the persistent and deliberate course of unreasonable and oppressive conduct with some constant and objectionable sexual hallmarks, a tort of sexual harassment would have been committed. The vulgar and sexually explicit words complained of by the respondent clearly would be sexual harassment, emanating from verbal harassment as elucidated under the 1999 Practice Code. The lecherous behaviour of the appellant fell squarely under the definition adopted by *Hayes v. Willoughby* and the hallmarks of sexual harassment. (paras 57, 58 & 60)

(3) Even though a singular act was sufficient to establish a tort of intentionally causing nervous shock, but being a more demanding tort, an aggrieved person must necessarily establish that she had suffered physical harm. The psychiatrist DW1 only saw the respondent three

years after the incident and his report was silent on the physical harm aspect, despite having seen her four times. In fact, in the record of appeal, it was stated in no uncertain terms 'Physically, she is normal'. Therefore, on a balance of probabilities, it could not be said that the respondent had successfully established the tort of intentionally causing nervous shock. (paras 62 & 63)

(4) To demand corroboration, just because there exists some sexual flavour in the complaint, would cause the harassed person to be, more often than not, helpless, as most of the evidence will consist of the words of the harasser *vis-a-vis* the victim. And much of such leery harassment invariably takes place in private. In our judicial system, much defence is given to the ability of judges to scrutinise carefully the evidence before them and eventually arrive at a factual finding, but subject to the long standing rule of the litigant establishing his case on the standard of balance of probabilities. The judge who is in an advantageous position, and has the audio visual superiority, will be arriving at a decision based on the facts adduced before him. There is no hard and fast rule that in a tort of sexual harassment case that there must be corroboration, though like in any civil case the rule of evidence must be stringently upheld. Further, after perusing the pleadings herein, the cause of action of sexual harassment was adequately pleaded, supported further by the particulars of the harassment. (paras 70, 71 & 74)

(5) The respondent was an emotionally vulnerable person, and appeared to be under some emotional pressure. The appellant surely would know that the continuous vulgar and sexually explicit remarks would make the respondent feel extremely uncomfortable. Having perused the evidence, there was no reason to disturb the finding of the judge which led to the dismissal of the main suit. The appellant had uttered vulgar and sexually explicit rude remarks, either addressed directly to the respondent or in her presence and knowing that she would hear it, justifying the complaint. (paras 77 & 78)

(6) The decision by the High Court over the counterclaim must be affirmed but based on the tort of sexual harassment. The ingredients of sexual harassment were present in abundance, namely the existence of a persistent and deliberate course of unreasonable and oppressive conduct targeted at another person calculated to cause alarm, fear and distress to that person. This conduct was heavily spiced with sexual hallmarks as illustrated by the continuous leery and obscene verbal remarks uttered by the appellant, which culminated in the respondent displaying symptoms of emotional distress, annoyance and mental depression due to the alarm, fear and anxiety. However, her sufferings had not attained the level of physical harm to qualify for the tort of intentionally causing nervous shock as decided by the Court of Appeal. (para 79)

(7) In appropriate cases, substantial damages may be awarded for any indignity, discomfort or inconvenience suffered; even aggravated damages may be awarded in light of the motive or conduct of the tortfeasor. In the circumstances of this case, it was reasonable for the High Court to grant the general and aggravated damages for the proven tort of sexual harassment. (paras 76 & 80)

(8) Sexual harassment is a very serious misconduct and in whatever form it takes, cannot be tolerated by anyone. In whatever form it comes, it lowers the dignity and respect of the person who is harassed, let alone affecting his or her mental and emotional well-being. Perpetrators who go unpunished, will continue intimidating, humiliating and traumatising the victims thus resulting, at least, in an unhealthy working environment. With the tort of sexual harassment being freshly introduced into our legal and judicial system, this court refrained from answering the leave question. (paras 81 & 83)

Bahasa Malaysia *Headnotes*

Perayu dan responden adalah pekerja Lembaga Tabung Haji ('syarikat'). Responden, sebagai orang bawahan perayu, melapor terus kepadanya. Pada 29 September 2009, responden membuat aduan ('aduan') kepada Ketua Pegawai Eksekutif syarikat bahawa perayu melakukan gangguan seksual terhadapnya. Siasatan dijalankan dan jawatankuasa mendapati tiada keterangan yang mencukupi untuk mewajarkan tindakan disiplin diambil terhadap perayu. Pada 9 Disember 2011, perayu mengeluarkan writ terhadap responden menuntut, antara lain, perisytiharan bahawa dia tidak melakukan gangguan seksual terhadap responden dan telah difitnah olehnya. Sebagai tambahan kepada permohonan maaf secara terbuka, perayu menuntut ganti rugi am dan tambahan berserta faedah dan kos daripada responden. Responden memfailkan pembelaan dan juga tuntutan balas terhadap perayu pada 28 Disember 2011. Dalam pembelaannya, responden memperincikan butir-butir gangguan seksual tersebut dan juga mendakwa bahawa dia telah menderita di bawah perayu. Responden menuntut balas untuk ganti rugi berasaskan kepada gangguan seksual dan menuntut ganti rugi am, tambahan dan teladan. Mahkamah Tinggi menolak tuntutan perayu, dan juga memasukkan penghakiman untuk responden atas tuntutan balasnya. Oleh kerana dapatan Mahkamah Tinggi bahawa gangguan seksual telah dibuktikan, ganti rugi am dan tambahan RM100,000 dan RM20,000 masing-masing diawardkan untuk penderitaan, yang diputuskan oleh Mahkamah Tinggi adalah punca kemurungan responden. Perayu merayu ke Mahkamah Rayuan melalui notis rayuan terhadap penolakan saman utama perayu dan terhadap keputusan membenarkan tuntutan balas yang difailkan oleh responden. Mahkamah Rayuan menolak rayuan perayu dan mengesahkan keputusan Mahkamah Tinggi. Kausa tindakan didapati atas tort mengakibatkan 'nervous shock' dengan sengaja. Tidak berpuas hati dengan

keputusan Mahkamah Rayuan, perayu memohon kebenaran Mahkamah Persekutuan dan berjaya memperolehinya atas persoalan berikut: sama ada terdapat kausa tindakan yang sah untuk tuntutan sivil atas alasan gangguan seksual di bawah undang-undang sedia ada di Malaysia.

Diputuskan (menolak rayuan perayu)

Oleh Suriyadi Halim Omar HMP menyampaikan penghakiman mahkamah:

(1) Sebelum Akta Kerja (Pindaan) 2012 berkuat kuasa, tiada peruntukan berkanun berkenaan gangguan seksual di Malaysia. Perubahan penting muncul dalam bentuk Akta Kerja 1955, apabila Bahagian XVA yang baru, yang menangani gangguan seksual di tempat kerja dimasukkan. Bahagian baru yang diwujudkan dalam Akta Kerja itu adalah satu aspek penting dalam pembaharuan undang-undang bertujuan untuk menangani panggilan untuk campur tangan perundangan tertentu dalam menangani gangguan seksual. Seksyen 2(g) Akta Kerja (Pindaan) 2012 memasukkan definisi gangguan seksual yang baru dalam s. 2 Akta Kerja 1955 yang memenuhi unsur-unsur utama gangguan seksual. Ciri yang menarik daripada *The Malaysian Code of Practice on the Prevention and Education of Sexual Harassment in the Workplace 1999 ('1999 Practice Code')* dan kewujudan Bahagian XVA dalam Akta Kerja 1955 adalah bahawa seorang mangsa sekarang berhak untuk membuat aduan kepada majikan dan untuk mewajibkan majikan membuat siasatan aduan gangguan seksual.

(2) Gangguan berkali-kali ditakrifkan sebagai 'a persistent and deliberate course of unreasonable and oppressive conduct, targeted at another person, which is calculated and does cause that person alarm, fear or distress' (*Thomas v. News Group Newspaper Ltd*). Tort gangguan seksual telah dilakukan apabila terdapat kelakuan yang tidak munasabah dan menindas dengan beberapa kenyataan berciri seksual secara berterusan dan disengajakan. Perkataan kasar dan jelas berhubungan dengan seks yang diadukan oleh responden adalah gangguan seksual, yang berpunca daripada gangguan lisan seperti dijelaskan di bawah 1999 Practice Code. Tingkah laku gasang perayu jelas terangkum di bawah takrif yang digunakan dalam kes *Hayes v. Willoughby* dan ciri-ciri gangguan seksual.

(3) Walaupun perbuatan tunggal adalah mencukupi untuk membuktikan tort mengakibatkan 'nervous shock' dengan sengaja, tetapi kerana ia adalah tort yang lebih mencabar, orang yang terkilan harus membuktikan bahawa dia mengalami kecederaan fizikal. Pakar psikiatri DW1 hanya berjumpa dengan responden tiga tahun selepas kejadian itu dan laporannya tidak menyatakan apa-apa berkenaan aspek kecederaan fizikal, walaupun telah berjumpa dengannya sebanyak empat kali. Secara fakta, dalam rekod rayuan, telah dinyatakan dengan tegas

A 'Physically, she is normal'. Oleh itu, atas imbangan kebarangkalian, tidak boleh dikatakan bahawa responden berjaya membuktikan tort mengakibatkan 'nervous shock' dengan sengaja.

(4) Menuntut keterangan sokongan, hanya kerana terdapat ciri-ciri seksual dalam aduan, akan menyebabkan orang yang diganggu itu berada dalam
B keadaan tidak berdaya kerana keterangan akan mengandungi perkataan-perkataan pengganggu *vis-a-vis* mangsa. Dan gangguan sangsi selalunya dilakukan secara tertutup. Dalam sistem kehakiman kita, pembelaan diberikan kepada keupayaan hakim-hakim untuk meneliti dengan betul keterangan di hadapan mereka dan akhirnya mencapai suatu dapatan
C fakta, tetapi tertakluk kepada peraturan lama bahawa litigan yang membuktikan kesnya berbuat demikian pada taraf imbangan kebarangkalian. Hakim yang berada dalam kedudukan yang berfaedah, dan mempunyai kelebihan melihat dan mendengar, akan mencapai keputusan berdasarkan fakta-fakta yang dikemukakan. Tiada peraturan
D bahawa dalam kes tort gangguan seksual memerlukan keterangan sokongan, walaupun dalam kes sivil yang lain peraturan keterangan mesti dikekalkan dengan ketat. Tambahan lagi, selepas meneliti pliding di sini, kausa tindakan gangguan seksual telah diplidkan dengan secukupnya, disokong lanjut oleh butir-butir gangguan itu.

E **(5)** Responden adalah seorang yang penuh perasaan dan mudah tersinggung, dan kelihatan mengalami tekanan emosi. Perayu sudah tentu akan tahu bahawa komen eksplisit kasar dan seksual yang berterusan akan membuatkan responden berasa tidak selesa. Setelah meneliti keterangan, tiada alasan untuk mengganggu dapatan hakim yang membawa kepada
F penolakan guaman utama. Perayu telah menyatakan kata-kata kesat yang mengandungi ciri-ciri kekasaran dan seksual, sama ada secara mengemukakannya terus kepada responden, atau dalam kehadirannya dengan pengetahuan bahawa responden akan mendengarnya, dengan itu menjustifikasikan aduan yang dibuat.

G **(6)** Keputusan Mahkamah Tinggi berkenaan tuntutan balas harus disahkan tetapi berdasarkan tort gangguan seksual. Ciri-ciri gangguan seksual kukuh hadir, iaitu dengan kewujudan kelakuan tidak munasabah dan menindaskan yang dibuat secara berterusan dan disengajakan ditujukan kepada seorang individu untuk menyebabkan kejutan, perasan takut dan
H kecemasan. Kelakuannya dipenuhi dengan ciri-ciri seksual seperti yang diilustrasikan oleh kata-kata lisan perayu yang sangsi dan lucah, yang berakhir dengan responden memaparkan tanda-tanda tekanan emosi, kegusaran dan kemurungan mental disebabkan kecemasan, ketakutan dan kebimbangan. Walau bagaimanapun, penderitaannya belum
I mencapai tahap kecederaan fizikal untuk melayakkan tort menyebabkan 'nervous shock' dengan sengaja seperti yang diputuskan oleh Mahkamah Rayuan.

(7) Dalam kes yang sesuai, ganti rugi besar boleh diawardkan untuk penghinaan, ketidakselesaan atau kesulitan yang dialami; juga ganti rugi tambahan boleh diawardkan melihat pada motif atau kelakuan pembuat kesalahan. Dalam hal keadaan kes ini, adalah munasabah untuk Mahkamah Tinggi membenarkan ganti rugi am dan tambahan untuk tort gangguan seksual yang telah dibuktikan.

(8) Gangguan seksual adalah salah laku yang serius dan dalam bentuk apa sekalipun, dan tidak boleh diterima oleh sesiapa. Dalam apa jua bentuk, ia merendahkan maruah dan kehormatan orang yang diganggu, dan juga menjejaskan kesejahteraan mental dan emosinya. Pesalah yang tidak dihukum, akan terus mengugut, memalukan dan membawa trauma kepada mangsa-mangsanya, mengakibatkan persekitaran kerja yang tidak sihat. Dengan tort gangguan seksual yang baru diperkenalkan dalam sistem perundangan dan kehakiman kita, mahkamah ini mengelak daripada menjawab soalan undang-undang yang telah dibenarkan.

Case(s) referred to:

Appleton v. Garrett [1996] PIQR P1 ***(refd)***
AXA Insurance Singapore Pte Ltd v. Chandran s/o Natesan [2013] 4 SLR 545 ***(dist)***
Beckett v. Walker [1985] CLY 129a ***(refd)***
Burris v. Azadani [1995] 4 All ER 802 ***(refd)***
Clark v. Canada [1994] 3 FC 323 ***(refd)***
Farrell v. Secretary of State for Defence [1980] WLR 172 ***(refd)***
FH v. Mc Dougall 2008 SCC 53 ***(refd)***
Hayes v. Willoughby [2013] 1 WLR 935 ***(refd)***
Hunter v. Canary Wharf Ltd [1997] 2 All ER 426 ***(refd)***
Khorasandjian v. Bush [1993] QB 727 ***(refd)***
Kuchenmeister v. Home Office [1958] 1 QB 496 ***(refd)***
Lau Tat Wai v. Yip Lai Kuen Joey [2013] HKCFI 639 ***(refd)***
Malcomson Nicholas Hugh Bertram v. Naresh Kumar Mehta [2001] 3 SLR (R) 379 ***(refd)***
Malone v. Laskey [1907] 2 KB 141 ***(refd)***
Novotel Societe d' Investissements et d' Exploitation Hoteliers & Anor v. Pernas Hotel Chain (Selangor) Bhd [1986] 1 LNS 83 SC ***(refd)***
Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor [2009] 6 CLJ 430 FC ***(refd)***
Pang Koi Fa v. Lim Djoe Phing [1993] 3 SLR 317 ***(refd)***
Patel v. Patel [1988] 2 FLR 179 ***(refd)***
Rookes v. Barnard [1964] AC 1129 ***(refd)***
Tee Yok Kiat v. Pang Min Seng [2013] SGCA 9 ***(refd)***
Thomas v. News Group Newspapers Ltd [2002] EMLR 78 ***(refd)***
W v. Meah [1986] 1 All ER 935 ***(refd)***
Wilkinson v. Downton (1897) 2 QB 57 ***(refd)***
Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 3(1)
Employment Act 1955, ss. 2, 81A, 81B, 81C, 81D, 81E, 81F, 81G

Other source(s) referred to:
Goh Yihan, *The Case for Legislating Harassment in Singapore'*, (2014) 26 SAcLJ
Halsbury's Laws of England, 4th edn, p 306, para 456

For the appellant - Fahri Azzat, Aisya Abdul Rahman & Rafeeza Hamdan; M/s Azzat & Izzat

For the respondent - M David Morais, Leong Phaik Leng, Karyn Khoo & Tan Shang Neng; M/s Sreenevasan Young

[Editor's note: For the Court of Appeal judgment, please see Mohd Ridzwan Abdul Razak v. Asmah Hj Mohd Nor [2015] 4 CLJ 295 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Suriyadi Halim Omar FCJ:

[1] The appellant and the respondent were employees of Lembaga Tabung Haji (the company). The appellant was the General Manager of the Risk Management Department whilst the respondent held the position of senior manager in that department. The respondent being the subordinate of the appellant reported directly to him.

[2] On 29 July 2009, the respondent lodged a complaint (the complaint) to the Chief Executive Officer of the company complaining of sexual harassment by the appellant.

[3] As a result of the complaint, the company set up a committee of inquiry (the committee), which then conducted an inquiry from 1 September 2009 until 16 September 2009. The committee found that there was insufficient evidence to warrant disciplinary action to be taken against the appellant. However, the Human Resources Department of the company decided to issue a strong administrative reprimand to the appellant. The respondent applied for and was later transferred to the Legal Division of the company.

[4] Aggrieved by the complaint, which the appellant claimed to be defamatory of him, and had affected his reputation and standing as a Muslim, and as a member of the senior management of the company that led to his contract at the company not being renewed, the appellant lodged an official complaint to the company. He sought for disciplinary action to be taken against the respondent for lodging the complaint without any proof. Despite his request the company took no disciplinary action against the respondent.

[5] The appellant then requested the company to supply him with the respondent's complaint documents and the report of the committee. However the company only furnished the complaint documents.

[6] The respondent also never apologised to the appellant for the sexual harassment complaint made against him.

[7] On 9 December 2011, the appellant issued a writ against the respondent seeking, *inter alia*, a declaration that he had not sexually harassed the respondent and that he had been defamed by her. In addition to a public apology, the appellant sought general and aggravated damages against the respondent, interest, and costs.

[8] The respondent filed her defence and also a counterclaim against the appellant on 28 December 2011. In her defence, the respondent particularised the sexual harassment as laid down at paras. 27 and 28, of this judgment and further alleged that she had suffered under the appellant. She pleaded that the allegations of defamation of the appellant were untrue. The respondent also pleaded that her allegations were upheld by their employer and that a serious disciplinary warning was issued to the appellant pursuant to the complaint.

[9] The respondent counterclaimed for damages predicated on sexual harassment. She claimed for general, aggravated and exemplary damages. She relied largely on a psychiatrist's report to explain the repercussion of the harassment.

Findings Of The High Court

[10] On 24 September 2012, the High Court dismissed the appellant's claim and also entered judgment for the respondent on her counterclaim. The counterclaim as pleaded, laid down that she had suffered emotional and mental stress and trauma. As the finding of fact of the High Court of the sexual harassment allegation had been established, general and aggravated damages of RM100,000 and RM20,000 were respectively awarded for sufferings, which the High Court held was the cause of the respondent's major depression (p. 92 CB). The learned judge, on the other hand failed to clarify her stance as regards the pleaded tort of sexual harassment, or upon what tort the decision was founded on.

[11] The appellant appealed to the Court of Appeal in a singular notice of appeal against the rejection of the appellant's main suit and for allowing the counterclaim filed by the respondent. On 6 February 2013 the appeal was dismissed. The effect was that the whole decision of the High Court was affirmed. It is pertinent to observe that the Court of Appeal upheld the factual finding of the learned judge though the cause of action was founded on the tort of intentionally causing nervous shock.

[12] Dissatisfied with the decision of the Court of Appeal, the appellant applied for leave to the Federal Court, and on 30 May 2013 successfully obtained leave from us on the following question of law:

> Is there a valid cause of action for a civil claim on the grounds of sexual harassment under the existing laws of Malaysia?

[13] A perusal of the notice of appeal to the Federal Court filed by the appellant again showed that it was an appeal against the whole of the decision of the Court of Appeal that upheld the High Court's decision regarding the main suit and the counterclaim. Having traced the chronology and antecedent of the case, and having considered the submissions of parties, we then proceeded with the appeal, dealing simultaneously with the main suit and the counterclaim.

[14] Our main constraint was that the leave question concerned the tort of harassment, a tort that was not the basis of the Court of Appeal's decision, or stated to be so by the High Court.

[15] Due to the very nature of the leave question to be determined by us, much of the submissions of both parties were focused on the counterclaim.

The Appellant's Submission

[16] The appellant began by submitting that there is no civil cause of action of sexual harassment under the present Malaysian law. The tort of intentionally causing nervous shock found by the Court of Appeal too is not yet common law in Malaysia, and cannot be introduced through this case, as the respondent neither pleaded nor had successfully proven it at the trial.

[17] The appellant submitted that a victim of a tort of intentionally causing nervous shock may only avail herself to civil remedies if her case fulfils the ingredients of that tort.

[18] After that initial general introduction, the appellant zeroed in onto the issue of the tort of sexual harassment. It was highlighted that what constitutes as sexual harassment remains undefined under Malaysian law. The Malaysian Code of Practice on the Prevention and Education of Sexual Harassment in the Workplace 1999 (1999 Practice Code) on the other hand is merely used as a guideline to Malaysian employers and is without any legal force. The recent amendment to the Malaysian Employment Act 1955 only imposes a duty on employers to adequately deal with sexual harassment complaints at their workplace.

[19] Learned counsel for the appellant contended that even if the respondent were to have a cause of action, she failed to establish the elements of sexual harassment, let alone the tort of intentionally causing nervous shock.

[20] It was further submitted that the respondent must prove her counterclaim based on her own evidence, and corroboration of her evidence could not come from the appellant. Learned counsel for the appellant submitted that the courts below therefore erred in finding that the respondent's evidence could be corroborated by the appellant's evidence and witnesses.

[21] It was submitted that as the appellant was the alleged harasser, while PW2 and PW4 were the appellant's subordinates and the respondent's colleagues at the material time, the High Court had also failed to warn itself of the dangers of accepting the respondent's uncorroborated evidence. In short, the evidential complaint of the appellant was that the allegations of the respondent were uncorroborated.

The Respondent's Submission

[22] In reply, learned counsel for the respondent argued that while there is no express legislative Enactment on the tort of sexual harassment, there is recognition by the Government of Malaysia of sexual harassment as a prevalent occurrence, which must be addressed and eradicated from the workplace. This recognition comes in the form of the 1999 Practice Code.

[23] While the 1999 Practice Code does not have the force of law, it invariably sets out the Government's guidelines and public policy in relation to sexual harassment. It is recognised as a gender discrimination, which goes against the principle of equality of treatment in employment between genders.

[24] For purposes of this appeal, the respondent conceded that at common law there are two possible routes through which the tort covering harassment could be taken, namely the tort of intentionally causing nervous shock and the tort of harassment.

[25] The respondent rested her case on the tort of harassment which covers sexual harassment. The Court of Appeal on the other hand found that the appellant had committed the tort of intentionally causing nervous shock by wilfully causing physical harm to the respondent.

Our Preliminary Finding

[26] The statement of claim unfolds that the appellant sued the respondent for defamation arising from the respondent's complaint regarding his character in a letter dated 29 July 2009. This letter, to use the appellant's words in the statement of claim, was a sexual harassment complaint. In short, the terminology of sexual harassment was not an afterthought but had been alluded to right from the very beginning by the appellant himself.

[27] The complaints of the respondent alleged to be defamatory, as supplied in the statement of claim (from that letter of complaint) verbatim, are as follows:

(a) Dr Ridzwan had on 19 July 2009 at 8.15am uttered a vulgar remark towards me at the office;

(b) Dr Ridzwan is fond of making dirty jokes that are sex oriented in front of his subordinates without the slightest respect for his female subordinates;

(c) Dr Ridzwan had been using dirty words in emails which I found very disturbing, unethical and intolerable;

(d) Dr Ridzwan repeatedly offered me if I would be interested to be his second wife. His 'kidding' offerings were not funny at all…I felt extremely disgusted by his 'offerings' belittled and most of all insulted and humiliated;

(e) Dr Ridzwan had taken advantage of his position as a boss that he would simply say anything he wishes without considering the boundary and others' feeling and perception … he would not be bothered with the do's and dont's and most of all the work ethics; and

(f) Dr Ridzwan's immoral behavior has affected me psychologically.

[28] In her defence, the vulgar words and other harassing words uttered by the appellant were detailed out, *inter alia*:

(a) 'Fuck you';

(b) 'Kalau cari husband cari yang beragama, bertanggungjawab, macam I', 'You kena buat sembahyang istikharah dan kalau you mimpi, you akan berjimak dengan orang tu;

(c) 'Ingat tak seorang Cina masa di Bank dulu? Kalau you pergi meeting, you kena tebalkan muka, you kena ada strong "ball";

(d) 'Kalau you nak tahu 'benda' lelaki tu berfungsi ke tak ikut orang-orang tua, ikat 'benda' tu dekat tali. Tali tu sambungkan dengan buah kelapa. Kalau buah kelapa tu terangkat, maksudnya 'benda' tu 'good'. "Sexual graph of a person, men after 50 is no use. Kalau 20 it shoot up. 30 graf turun. When 40, it shoots up again';

(e) "F-U-C-K" (was the appellant's laptop password);

(f) "ANOTHER SOB, TYPICAL HOMEBREED";

(g) "I AM BEGINNING TO HATE VERY MUCH THESE HOMEBREED, WORST THAN KHINZIR";

(h) "You nak kahwin dengan I tak, I banyak duit tau";

(i) "Would you prefer married man"; and

(j) "You ni selalu sangat sakit. You kena kahwin tau. You nak tak laki orang";

[29] In the counterclaim, the respondent had explicitly pleaded the tort of sexual harassment by the appellant and had alluded to the above vulgar and demeaning remarks to support her case. In brief, the respondent pleaded that the sexual harassment had traumatised her emotionally and mentally.

[30] The High Court Judge after meticulously sifting the evidence, found that the respondent's various allegations set out in the letter of complaint, except the complaint about the e-mails, to be true. Pursuant to that factual finding the main suit founded on defamation was dismissed.

[31] The learned High Court Judge thereafter procedurally dealt with the counterclaim, and after going through the allegations point by point, found 'On the totality of the evidence, the … complaint had been proved on a balance of probabilities'. The High Court also accepted the psychiatrist's (DW1) findings that the respondent suffered from major depression caused by the sexual harassment of the appellant. The learned judge thereafter awarded her a sum of RM100,000 as general damages and a sum of RM20,000 as aggravated and exemplary damages.

[32] Despite the methodical analysis of the case, an error was detected whence the learned judge failed to mention the cause of action relied upon by her, when allowing the counterclaim. Only at the Court of Appeal stage was the cause of action identified ie, the tort of intentionally causing nervous shock, though not in accord with the pleadings. For the latter tort, the Court of Appeal in a large way, had relied on *Wilkinson v. Downton* (1897) 2 QB 57 and *Clark v. Canada* [1994] 3 FC 323.

[33] In *Wilkinson v. Downton* the defendant, by way of a practical joke, falsely represented to the plaintiff, a married woman, that her husband had met with a serious accident whereby both his legs were broken. The defendant made the statement with intent that it should be believed to be true. The plaintiff believed it to be true, and in consequence suffered a violent nervous shock which rendered her ill. The court held that these facts constituted a good cause of action.

[34] *Clark v. Canada* is more on point on the cause of action as introduced by the Court of Appeal. The facts are as follows. An action for damages was filed against the Crown by Clark, a former lady member of the Canadian Mounted Police, and alleged sexual and other harassment on the part of some of her male colleagues, causing her to suffer severe stress and depression and drove her to resign from the force. She claimed that she was wrongfully dismissed and that the actions of her colleagues and supervisors, amongst others had led to infliction of nervous shock. The court found for her.

[35] Whether the tort of intentionally causing nervous shock was correctly introduced by the Court of Appeal will be seen as we go along.

[36] We need also to highlight a few concessions made by parties, namely that in Malaysia the tort of sexual harassment at the time of filing of the action did not exist, nor any legislation had been promulgated on the law of sexual harassment prior to the Employment (Amendment) Act 2012 (Act A1419), which came into force on 1 April 2012. This Act included an amendment to include Part XVA into the Employment Act 1955 (Act 265). This amendment provided for the manner in which employers should deal with complaints of sexual harassment at the place of work ie, it puts the employer to task. This amendment unfortunately did not address the rights and liabilities of the harasser and the victim.

[37] Prior to the abovementioned amendment, the 1999 Practice Code was already in place. Its shortcoming was that it did not give rise to a cause of action for the victim against the harasser.

[38] The appellant also conceded that the court is not prevented from developing the law and introducing a law of tort where and when appropriate.

Course Of Action And Analysis

[39] After mulling over the matter, we arrived at a decision to undertake some judicial activism exercise and decide that it is timely to import the tort of harassment into our legal and judicial system, with sexual harassment being part of it.

[40] So, what should constitute definitive sexual harassment? Assistance may be sought from the 1999 Practice Code, in particular art. 4, which describes sexual harassment in the following manner:

> any unwanted conduct of a sexual nature having the effect of verbal, non-verbal, visual, psychological or physical harassment;
>
> (i) that might, on reasonable grounds, be perceived by the recipient as placing a condition of a sexual nature on her/his employment; or
>
> (ii) that might, on reasonable grounds be perceived by the recipient as an offence or humiliation, or a threat to her/his well-being, but has no direct link to her or his employment.

[41] According to the 1999 Practice Code, sexual harassment can be divided into two categories namely sexual coercion which is sexual harassment that results in some direct consequence to the victim's employment and sexual annoyance that is sexually related conduct that is offensive, hostile or intimidating to the recipient, which creates a bothersome working environment, which the recipient has to tolerate in order to continue working. Such conduct nevertheless need not be directly connected with any job benefits.

[42] Article 7 of the 1999 Practice Code provides that "sexual harassments refer to sexual conduct which is unwanted and unwelcome to the recipient". The 1999 Practice Code supplies examples of where harassment is likely to happen, and goes further to describe five possible forms of sexual harassment.

[43] Nevertheless, we must admit that the 1999 Practice Code merely represents a collective guideline on what sexual harassment is. Its aim is to provide guidelines to employers on the establishment of in-house mechanisms at the enterprise level to prevent and eradicate sexual harassment in the workplace. This Code does not provide any other avenue other than the workplace for the victim.

[44] As said above, at para. 36 of this judgment until the Employment (Amendment) Act 2012 came into force on 1 April 2012, there were no statutory provisions at all on sexual harassment in Malaysia. An important change came about in the form of the Employment Act 1955, when the new Part XVA, which deals with sexual harassment in the workplace was included. The newly created portion of the Employment Act therefore is a significant aspect of legal reform aimed at addressing the calls for specific legislative intervention in dealing with sexual harassment.

[45] Section 2(g) of the Employment (Amendment) Act 2012 inserted a new definition of sexual harassment in s. 2 of the Employment Act 1955, and it reads:

> sexual harassment means any unwanted conduct of a sexual nature, whether verbal, non-verbal, visual, gestural or physical, directed at a person which is offensive or humiliating or is a threat to his well-being, arising out of and in the course of his employment.

[46] This definition satisfies the three main elements of sexual harassment namely:

(i) the occurrence of conduct that is sexual in nature;

(ii) the conduct being unwanted; and

(iii) the conduct is perceived as threatening the victim's ability to perform her job.

[47] It is evident that there has been no reported case pertaining to the Employment Act 1955 in our country where the individual victim has claimed civil remedies from an alleged perpetrator for sexual harassment. The striking feature of the 1999 Practice Code and the creation of Part XVA in the Employment Act 1955 has been that a victim is now entitled to lodge a complaint to the employer and to require the employer to investigate the complaint of sexual harassment. However, admittedly as said earlier, no civil cause of action *per se* for sexual harassment under the present Malaysian law, exists.

[48] Tort law in our country is still very much based on English common law principles (s. 3(1) of the Civil Law Act 1956). Although the courts in Malaysia, as in Singapore are not bound by decisions of English courts, decisions of the highest court in England are highly persuasive (*Pang Koi Fa v. Lim Djoe Phing* [1993] 3 SLR 317).

[49] The law of tort, even though does provide protection to an individual in England, at the outset is very much property related; if one does not has a proprietary interest, say, a freehold or leasehold interest, then protection is not accorded (*Malone v. Laskey* [1907] 2 KB 141). As seen from the perspective of case laws, overcoming that proprietorial hurdle is a major challenge in the development of the tort of harassment.

[50] In *Patel v. Patel* [1988] 2 FLR 179, Waterhouse J when sitting as the second judge in the Court of Appeal had occasion to state that there was no tort of harassment in England then. A brief respite was seen when in *Khorasandjian v. Bush* (1993) QB 727, by a majority, the Court of Appeal held that the daughter who held no proprietorial interest over the property was entitled to litigate in that case. There the daughter was deluged by harassing and pestering telephone calls (the primary complaint being harassment rather than private nuisance). Dillon LJ after referring to Waterhouse J of *Patel v. Patel* (above) doubted that there was no tort of harassment. *Burris v. Azadani* [1995] 4 All ER 802 later also doubted the position of Waterhouse J.

[51] The House of Lords in *Hunter v. Canary Wharf Ltd* [1997] 2 All ER 426 (HL) unfortunately halted the development of *Khorasandjian v. Bush*, though it did acknowledge that there was no reason why an intentional tort could not compensate for mere distress, inconvenience or discomfort, rather than insisting on proof of a physical or psychiatric injury.

[52] The uncertainty in England as regards the tort of harassment is rescued by the existence of English legislation in the like of the Protection from Harassment Act 1997 (providing protection from harassment and similar conduct) and the Protection of Freedoms Act 2012 (creating offences for stalking as distinct from harassment). Lord Hoffmann in *Hunter v. Canary Wharf Ltd* pointed out that if not for these statutory protections for victims of harassment, the common law might have developed the tort of harassment.

[53] In Singapore, in the case of *Malcomson Nicholas Hugh Bertram v. Naresh Kumar Mehta* [2001] 3 SLR (R) 379, the plaintiff had filed an action against the defendant as he had been harassed and pestered, especially at his place of work. In that action the plaintiff prayed for damages and an injunction against the defendant. Despite the defendant not having entered his defence, the learned Judicial Commissioner still had to overcome various legal obstacles before arriving at a decision. At that point of time (2001) there was no recognisable tort under which the plaintiff could have successfully sued the defendant. The plaintiff could not sue under trespass as there was no physical contact and *Wilkinson v. Downton* was found to be equally inapplicable. The plaintiff had not suffered any bodily harm or any psychiatric illness. The learned Judicial Commissioner also made a finding of fact that the tort of private nuisance was inapplicable in that case. The Judicial Commissioner could easily have taken the easy way out by dismissing the suit, but despite those constraints, with judicial justification introduced the new tort of intentional harassment. The learned Judicial Commissioner in the course of introducing the latter tort defined harassment to mean:

> … a course of conduct by a person, whether by words or action, directly or through third parties, sufficiently repetitive in nature as would cause, and which he ought reasonably to know would cause, worry, emotional distress or annoyance to another person.

[54] Then came the case of *Tee Yok Kiat v. Pang Min Seng* [2013] SGCA 9, a Singapore Court of Appeal's case. Even though the Court of Appeal found for the plaintiff on the tort of intimidation, it also considered the tort of harassment. It acknowledged that *Malcomson* had extensively discussed the tort of harassment, and that tort had been compared and distinguished with the tort of intimidation thus recognising that the tort of harassment was good law in Singapore. At paras. 43-44, the Court of Appeal in the abovementioned *Tee Yok Kiat v. Pang Min Seng* had said: '… we found that the tort of harassment would also have been made out on the evidence … As both the torts of intimidation and harassment were made out on the evidence, we allowed the appeal in relation to the blackmail claim'. We therefore are satisfied that the Court of Appeal recognised the existence of the tort of harassment in Singapore.

[55] The case of *AXA Insurance Singapore Pte Ltd v. Chandran s/o Natesan* [2013] 4 SLR 545 threw a spanner into the spokes when it ruled that there was no such tort of harassment in existence in Singapore. It ruled that the Court of Appeal's treatment of *Malcomson* in *Tee Yok Kiat* was *obiter*. Regardless of the view held by *AXA Insurance* obviously it could not overrule *Malcomson* as both are High Court cases. Why it was necessary for *AXA Insurance* to discuss the tort of harassment and arrive at a finding, when it was not pleaded, is beyond us (and hence distinguishable with the appeal before us). From a scrutiny of *Tee Yok Kiat* we fail to understand too how it was misread by *AXA Insurance*.

[56] Hong Kong, in line with the approaches taken by England and Singapore also opted to import the tort of harassment in *Lau Tat Wai v. Yip Lai Kuen Joey* [2013] HKCFI 639. Anthony Chan J, after finding the harasser liable for the tort of intimidation, took the extra step of recognising the tort of harassment by adopting the definition of harassment as propounded by the above Singapore's case of *Malcomson Nicholas Hugh Bertram v. Naresh Kumar Mehta*.

[57] For our purpose, before defining the tortious phrase of sexual harassment, we need to know what harassment is in the first place. For brevity, when identifying the harasser or the victim, the pronouns he, she and her, apply to both gender whenever appropriate. Putting aside the statutory definition provided for in the Employment (Amendment) Act 2012 and in the Employment Act 1955 as discussed earlier, Lord Sumpton in *Hayes v. Willoughby* [2013] 1 WLR 935 acknowledged that harassment is an "ordinary English word with a well understood meaning." Citing *Thomas v. News Group Newspapers Ltd* [2002] EMLR 78 (at 30), Lord Sumpton stated that harassment is, "a persistent and deliberate course of unreasonable and oppressive conduct, targeted at another person, which is calculated and does cause that person alarm, fear or distress". We certainly have no disagreement with such a definition.

[58] Tainted further by the persistent, and deliberate course of unreasonable and oppressive conduct with some constant and objectionable sexual hallmarks, a tort of sexual harassment would have been committed. Jack Lee Tsen-Ta in his paper "*Workplace Sexual Harassment in Singapore: The Legal Challenge"*, when referring to Louise Fitzgerald and Alayne Omerod's *Sexual Harassment in Academia and the Workplace*, authored that sexual harassment involved, amongst others:

(a) sexualisation of a professional relationship;

(b) unwanted and unwelcome behaviour both verbal and non-verbal in nature; and

(c) a continuum from sexist remarks to non-verbal seductive gestures to sexual assault.

[59] After taking into consideration the above cases, empirical studies, and our personal researches, the recognisable hallmarks of sexual harassment are that they are unwelcome, taking the form of verbal and even physical, which include sexual innuendos, comments and remarks, suggestive, obscene or insulting sounds, implied sexual threats, leering, oogling, displaying offensive pictures, making obscene gestures etc. These overtures all share similar traits, in that they all have the air of seediness and cause disturbance or annoyance to the victim (short of a recognised psychiatric illness or physical harm) (See "*The Case for Legislating Harassment in Singapore*" by Goh Yihan (2014) 26 SAcLJ).

[60] The Court of Appeal here (paras. 25-26, 40 and 49 of its grounds of judgment) agreed that the vulgar and sexually explicit words complained of by the respondent clearly would be sexual harassment, emanating from verbal harassment as elucidated under the 1999 Practice Code. Without the need to seek assistance from the latter Code, we on the other hand are satisfied that the lecherous behaviour of the appellant would fall squarely under the definition adopted by Lord Sumpton in the earlier cited case of *Hayes v. Willoughby* (*supra*) and the hallmarks of sexual harassment as alluded to at para. 59 of this judgment.

[61] Instead of stopping short at the tort of harassment, the Court of Appeal proffered that, as the acts of sexual harassment were serious enough, and had caused adverse psychological effect to the respondent, those acts of the appellant would fall under the tort of intentionally causing nervous shock propounded in *Wilkinson v. Downton*.

[62] We hold the view that even though a singular act is sufficient to establish a tort of intentionally causing nervous shock as introduced in *Wilkinson v. Downton*, but being a more demanding tort, an aggrieved person must necessarily establish that she has suffered physical harm (*Halsbury's Laws of England*, 4th edn, p. 306 para. 456).

[63] The psychiatrist (DW1), only saw the respondent three years after the incident and his report is silent on the physical harm aspect, despite seeing her four times. In fact exh. D1 at p. 333 of the record of appeal, Part C (vol. 1) in no uncertain terms reads, 'Physically she is normal'. Therefore on a balance of probabilities it cannot be said that the respondent has successfully established the tort of intentionally causing nervous shock.

[64] By taking that course of action the Court of Appeal thus had unwittingly missed the opportunity to discuss the applicability of the tort of harassment at the outset (based on the facts), despite this tort fitting the bill in the circumstances of the case.

[65] To reiterate, our introduction of the tort of harassment can be justified on the premise that:

(i) the tort of sexual harassment was pleaded;

(ii) it was ventilated at the High Court;

(iii) the tort of intentionally causing nervous shock was never pleaded in the counterclaim;

(iv) parties had no opportunity to submit or call witnesses to establish or disagree with this unsolicited tort;

(v) there was insufficient evidence or reason to introduce and establish the tort of intentionally causing nervous shock;

(vi) there were sufficient reasons to import the tort of sexual harassment; and

(vii) the evidence was more than ample to establish this tort.

[66] Other issues ventilated.

Corroboration

[67] The appellant ventilated that corroboration is required, "as a matter of practice for evidence of complainant in sexual cases and by accomplices in cases of sexual harassment (para. 93 of the appellant's written submission)". As the appellant has made mention of the need of corroboration we will now discuss whether corroboration is a legal requirement. We start by stating the obvious ie, the standard of proof in civil cases has traditionally been on a balance of probabilities, a standard that is certainly lower than that of criminal cases; nowhere near that of proving a case beyond reasonable doubt.

[68] To allay any fear, we are constantly wary and alert of vindictive complaints and the debilitating effect such complaints has on a person, the family and the alleged perpetrator's social standing once they are made.

[69] Even Ashgar Ali Ali Mohamed, Muzaffar Shah Mallow and Farheen Baig Sardar Baig in *Sexual Harassment at Workplace in Malaysia (2011) MCLJ* did highlight the need for corroborative evidence in order to establish such tort. Regretfully, the writer somehow has missed the point that a harassed person, say a lady, does not file a complaint for the pleasure of it. By filing a complaint she equally suffers potential censure. An unsuccessful complaint, or eliciting disbelief by her employer, will inevitably expose her to public ostracisation, and may create great anxiety and discomfort at the workplace for her.

[70] To demand corroboration, just because there exists some sexual favour in the complaint will cause the harassed person to be, more often than not helpless, as most of the evidence will consist of the words of the harasser *vis-à-vis* the victim. And much of such leery harassment invariably takes place in private (*FH v. Mc Dougall* 2008 SCC 53).

[71] In our judicial system much deference is given to the ability of judges to scrutinise carefully the evidence before them and eventually arrive at a factual finding, but subject to the long-standing rule of the litigant establishing his case on the standard of balance of probabilities. The learned judge who is in an advantageous position, and has the audio visual superiority, will be arriving at a decision based on the facts adduced before him. In short, there is no hard and fast rule that in a tort of sexual harassment case there must be corroboration, though like in any civil case the rule of evidence must be stringently upheld.

Pleadings Issue

[72] It is established law that parties are confined to their pleadings and courts are to decide on issues raised in them. The confinement of issues within the four corners of the pleadings, amongst others, help the court identify and adjudicate in an orderly fashion the matter before it, prevent surprises, and to inform parties in advance of the case they have to meet and thereafter deal with them accordingly (*Novotel Societe d' Investissements et d' Exploitation Hoteliers & Anor v. Pernas Hotel Chain (Selangor) Bhd* [1986] 1 LNS 83; [1987] 1 MLJ 210; *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330; [1990] 2 MLJ 152); *Farrell v. Secretary of State for Defence* [1980] WLR 172; *Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor* [2009] 6 CLJ 430; [2009] 6 MLJ 293).

[73] The appellant took issue pertaining to the adequacy of the pleadings, submitting that no cause of action was pleaded.

[74] After perusing the pleadings before us we are in full agreement with the respondent that the cause of action of sexual harassment was adequately pleaded, supported further by the particulars of the harassment.

Entitlement To Damages

[75] For purposes of this appeal, we shall only discuss the general and aggravated damages awarded by the High Court, which were subsequently affirmed by the Court of Appeal. Civil courts have at their disposal coercive powers, the main object being to redress harm and restore injured parties to their former position, if possible. General damages may be awarded for injuries that the law presumes to be a necessary result of the harm committed by the tortfeasor. Any pleaded and successfully proven damages may be awarded too eg, medical expenses (categorised as special damages). The stage of classifying damages, based on the amount, comes next. Nominal damages may be awarded where an aggrieved party proves that he has suffered from a tort actionable *per se*, particularly if he fails to show no loss. Such damages is given to vindicate the victim's rights, even if no pecuniary damage is suffered (*Kuchenmeister v. Home Office* [1958] 1 QB 496 and *Beckett v. Walker* [1985] CLY 129a).

[76] In appropriate cases, substantial damages may be awarded for any indignity, discomfort or inconvenience suffered; even aggravated damages may be awarded in light of the motive or conduct of the tortfeasor (*Rookes v. Barnard* (1964) AC 1129 at 1221-23 (HL); *W v. Meah* [1986] 1 All ER 935). As an analogy, in *Appleton v. Garrett* [1996] PIQR P1 aggravated damages were given to the patients of a dentist for injury to feelings, mental distress, anger and indignation upon learning that much of the dental treatment given to them was unnecessary and to a large extent performed on healthy teeth. The dentist had deliberately and in bad faith concealed from them the true condition of their teeth so that he could carry out dental work for profit.

[77] From the evidence led before the High Court, it was established that the respondent was an emotionally vulnerable person, in the sense that she appeared to be under some emotional pressure. She suffered migraine and pain in her leg, and she would be more susceptible to being adversely affected by the objectionable remarks made by the appellant. The appellant surely would know that the continuous vulgar and sexually explicit remarks would make the respondent feel extremely uncomfortable.

[78] Having perused the evidence, we see no reason to disturb the factual finding of the learned judge which led to the dismissal of the main suit. There was indeed ample evidence to show that the appellant had uttered vulgar and sexually explicit rude remarks, either addressed directly to the respondent or in her presence and knowing that she would hear it, justifying the complaint.

[79] We are also of the considered view that the decision by the High Court over the counterclaim must be affirmed but based on the tort of sexual harassment. The ingredients of sexual harassment are present in abundance, namely the existence of a persistent and deliberate course of unreasonable and oppressive conduct targeted at another person (in this case the respondent), calculated to cause alarm, fear and distress to that person. This

A conduct is heavily spiced with sexual hallmarks as illustrated by the continuous leery and obscene verbal remarks uttered by the appellant, which culminated in the respondent displaying symptoms of emotional distress, annoyance and mental depression due to the alarm, fear and anxiety. On the other hand, we are not satisfied that her sufferings had attained the level of
B physical harm to qualify for the tort of intentionally causing nervous shock as decided by the Court of Appeal.

[80] In the circumstances of this case it was reasonable for the High Court to grant the general and aggravated damages for the proven tort of sexual harassment.

C

Conclusion

[81] Sexual harassment is a very serious misconduct and in whatever form it takes, cannot be tolerated by anyone. In whatever form it comes, it lowers the dignity and respect of the person who is harassed, let alone affecting his
D or her mental and emotional well-being. Perpetrators who go unpunished, will continue intimidating, humiliating and traumatising the victims thus resulting, at least, in an unhealthy working environment.

[82] We therefore find substance in the submission of learned counsel for the respondent and therefore dismiss the appellant's appeal with costs.

E

[83] With the tort of sexual harassment being freshly introduced into our legal and judicial system, we therefore refrain from answering the leave question.

[84] We order costs at RM20,000 as agreed by parties.

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